Volume 46 | Issue 1 Article 11

December 1939

Wills--Construction--After-Acquired Property

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The West Virginia court in following this second line of authority purports to distinguish the *Ness* case on the basis of a slight difference in the wording of the incontestability clause.[9] At the same time, however, it recognizes that there are cases involving an incontestability clause identical with the one in the principal case which nevertheless adopt the view of the *Ness* case. This tends to show that the court in fact rejected the *Ness* case, and would probably reach the same result regardless of the wording of the clause.

J. L. G., Jr.

WILLS — CONSTRUCTION — AFTER-ACQUIRED PROPERTY. — In executing his will, the testator devised to his second wife and his children by her, "all of my real estate, consisting of three certain tracts or parcels of land situated in Walton District . . . . containing in all about 109 acres." Before his death he acquired two additional tracts in the same Walton district, comprising about 102 acres. The children of his first marriage, to whom he bequeathed one dollar each, claimed that he died intestate as to the two tracts he acquired after executing his will. *Held,* one judge dissenting, that after-acquired property does not pass under a specific devise when the description is not sufficiently broad to include the property. *Jarvis v. Jarvis.*[1]

A West Virginia statute provides: "A will shall be construed, with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."[2] The court envisioned the testator as looking over the will at the time of his death and finding that the "three certain tracts . . . . of land containing . . . . 109 acres" could not mean five certain tracts aggregating 211 acres. The majority opinion relied upon *McComb v. McComb*[3] where the testator devised to his sons "all my real

[9] "Incontestability.—Except for non-payment of premiums and except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively, this Policy shall be incontestable after one year from its date of issue . . ." Ness v. Mutual Life Ins. Co., 70 F. (2d) 59 (C. C. A. 4th, 1934). The important words of the incontestability clause in the principal case are, ". . . . except as to provisions and conditions relating to Disability and Double Indemnity Benefits."

[1] 3 S. E. (2d) 619 (W. Va. 1939). The clause relating to the one dollar bequest does not appear in the court's opinion, but is taken from the record of the circuit court.

[2] W. VA. REV. CODE (Michie, 1937) c. 41, art. 3, § 1.

[3] 200 S. E. 49 (W. Va. 1939).

estate . . . . on the East side of Main Street between Fourth and Fifth Streets." This was held to be a specific devise, and did not pass after-acquired property situated on the east side of Main Street between Fifth and Sixth Streets.[4]

The argument of the dissenting judge in the principal case was that "three certain tracts . . . of land containing . . . . 109 acres" was intended to be subordinate to, and controlled by the phrase "all of my real estate," and based his view on the case of *Dearing v. Selvey*[5] where the testator devised "my home farm of about 152½ acres to my wife," and upon the wife's death "said home farm of about 152½ acres" was to be sold by the executor and the proceeds divided among nine children. Three after-acquired tracts, including one acre of coal were held to pass under the will, to be sold by the executor.

A pertinent Virginia decision is that of *Honaker v. Starks*[6] wherein testator bequeathed "my stock (one share)" and later acquired four more shares. All five shares passed, the court stating that where the subject matter is sufficiently ascertained, as here by the use of the words "my stock", then added particulars of description which are false or mistaken will be rejected.

Under the common law, property acquired by the testator after the execution of his will did not pass unless there was a republication of the will.[7] This rule has been changed by statutes of varying constructions.[8] An act of the Virginia Legislature of 1785[9] was construed to allow a devise of after-acquired property only if the language of the will showed the intention of the testator to dispose of such land.[10] In 1849 this provision was changed,[11] and like the present West Virginia statute, provides that all the property owned by the testator at his death passes under the devise unless a contrary intention appears by the will.[12] Thus, the court

[4] It should be noted that in the McComb case the subject matter of the devise is certain restricted property, whereas the subject matter of the Jarvis case is "all of my real estate" which is set off by a comma from the modifying descriptive phrase which follows.

[5] 50 W. Va. 4, 40 S. E. 478 (1901).

[6] 114 Va. 37, 75 S. E. 741 (1912).

[7] Note (1921) 28 R. C. L. § 204.

[8] 69 C. J. 368 § 1384; Dockery's Ex'rs v. Dockery, 170 Ky. 194, 185 S. W. 849 (1916); Miller v. Bower, 260 Pa. 349, 103 Atl. 729 (1918); Pray v. Waterston, 12 Metc. 262 (Mass. 1847).

[9] 12 STAT. 138, 140 (1787).

[10] Allen v. Harrison, 3 Call 289 (Va. 1802).

[11] VA. REV. CODE (1849) c. 122, § 11.

[12] Raines v. Barker, 13 Gratt. 128 (Va. 1856); Dearing v. Selvey, 50 W. Va. 4, 40 S. E. 478 (1901).

in the principal case, by reaffirming the rule laid down in the *McComb* case that "the description is not sufficiently broad to include the property in question" is, in effect, interpreting the will under the construction[13] of the old Virginia statute.[14]

Whether or not the qualifying phrase "three certain tracts . . . . containing 109 acres" is evidence of the "contrary intention" appearing in the statute, would depend, in a close case, on the general tenor of the will. Various authorities on similar facts hold both ways,[15] probably on the strength of such facts, and not merely on the abstract question of contrary intention. The court will interpret certain words and phrases used by keeping in mind the whole scheme and general intent of the will, which intent technical rules of construction should not be allowed to defeat.[16]

In the case of *Runyon v. Mills*[17] the testator bequeathed and

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[13] Holding that a restrictive description indicates the "contrary intention" stated in the statute: Wootton v. Redd's Ex'rs, 12 Gratt. 196 (Va. 1855); *cf.* Totten v. Dawson, 104 W. Va. 274, 139 S. E. 858 (1927). But see 1 HARRISON, WILLS (2d ed. 1928) 1439, for a case where after-acquired property will pass where the will, "taken as a whole, does not show an intention not to devise it."

Criticizing such restrictive interpretations as in the principal case, Dean Pound states that a "strict and narrow interpretation . . . . represents the orthodox common law attitude toward legislative innovations." Pound, *Common Law and Legislation* (1909) 21 HARV. L. REV. 383, 385. The object of these will construction statutes was "to abolish a rule of law which, in most instances . . . . defeated the intention of those who devised all their estates . . . ." Pray v. Waterston, 12 Metc. 262, 265 (Mass. 1847).

[14] However, statements of quantity are seldom given much weight. Honaker v. Starks, 114 Va. 37, 75 S. E. 741 (1912).

[15] After-acquired property passes under the will: Dickerson's Appeal, 55 Conn. 223, 10 Atl. 194, 15 Atl. 99 (1887); Sussex Trust Co. v. Polite, 12 Del. Ch. 64, 106 Atl. 54 (1919); Woman's U. M. Soc. v. Mead, 131 Ill. 338, 23 N. E. 603 (1890); Haley v. Gatewood, 74 Tex. 281, 12 S. W. 25 (1889); Honaker v. Starks, 114 Va. 37, 75 S. E. 741 (1912) (personalty). With a statute similar to that of West Virginia, the North Carolina court has held that where the testator devised lands south of a certain line "containing by estimation 200 acres", after-acquired property south of said line passed by the will: Brown v. Hamilton, 135 N. C. 10, 47 S. E. 128 (1904). A more recent case is Holmes v. York, 203 N. C. 709, 166 S. E. 889 (1932). But *cf.* Hines v. Mercer, 125 N. C. 71, 34 S. E. 106 (1899).

Holding that after-acquired property did not pass by the will: Wheeler v. Brewster, 68 Conn. 177, 36 Atl. 32 (1896); Gray v. Garnett, 148 Ky. 34, 146 S. W. 18 (1912); *cf.* Dockery's Ex'rs v. Dockery, 170 Ky. 194, 185 S. W. 849 (1916) wherein the court was moved by the intention of the testator to divide the property evenly. A gift of testator's realty, followed by a statement that his realty consists of certain items of property which are specified, is a specific devise and does not pass after-acquired realty. Allison v. Hitchcock, 309 Mo. 488, 274 S. W. 798 (1925).

[16] Hinton v. Milburn's Ex'rs, 23 W. Va. 166 (1883); Rutter v. Anderson, 48 W. Va. 215, 36 S. E. 357 (1900); Bartlett v. Petty, 93 W. Va. 608, 117 S. E. 551 (1923).

[17] 86 W. Va. 388, 103 S. E. 112 (1920).

devised his property to his second wife and children, and included only one of his first wife's children. To the children of the first wife he gave one dollar each. The court held "The testator has here clearly shown, *by necessary implication,* his intention to give all his property to his children by his last wife, as a class." The court further stated that this implication need not be absolutely irresistible but only such as satisfies the mind of the court of the intention of the testator. Apparently in the principal case, the mind of the court was not satisfied as to the intention, even though the plaintiffs in this case were children of the testator's first wife, to whom he had bequeathed one dollar each. It would seem that the real intent of the testator was to exclude his first children from his property, which could have been made effective by the court's application of the presumption against intestacy.[18]

However, the court does not necessarily pursue the real or true intent of the testator. "In interpretation of a will, the true inquiry is not what the testator meant to express, but what do the words used express."[19] "It is not, what did he mean? but it is, what do his words mean?"[20] Thus, the court may have rested the decision on what they considered to be the apparent or indicated intent of the testator, to limit his devise to the three certain tracts of 109 acres. Had the real intent as evidenced by the tenor of the instrument and the whole scheme of the testator's devise and bequests been given effect, as was done in the *Runyon* case, then a contrary result might have been reached.[21]

J. S. M.

WORKMEN'S COMPENSATION — FILING APPLICATION WITHIN STATUTORY PERIOD. — Claimant was injured and four months later the employer reported the injury to the state compensation commissioner. Thereafter upon receipt of application forms from the commissioner and within six months from the date of injury, claimant went to the office of his employer, made out and signed the application for compensation, leaving it there with the expectation that it would be promptly forwarded to the commissioner.

[18] ". . . . where two modes of interpretation are possible, that is preferred which will prevent either total or partial intestacy", Honaker v. Starks, 114 Va. 37, 39, 57 S. E. 741 (1912). To the same effect, Carney v. Kain, 40 W. Va. 758, 23 S. E. 650 (1895); (1921) 28 R. C. L. 227.

[19] Pack v. Shanklin, 43 W. Va. 304, 313, 27 S. E. 389 (1897), quoting from Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23 (1887).

[20] Coberly v. Earle, 60 W. Va. 295, 302, 54 S. E. 336 (1906).

[21] 1 HARRISON, WILLS & ADMINISTRATION (2d ed. 1927) 380, § 193 (2).